

**11 PAGES**

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**UNITED STATES BANKRUPTCY COURT**  
**EASTERN DISTRICT OF CALIFORNIA**  
**FRESNO DIVISION**

In re:  
 TULARE LOCAL HEALTHCARE DISTRICT  
 dba TULARE REGIONAL MEDICAL  
 CENTER,  
 Debtor.

Case No. 17-13797-B-9

Chapter 9

DC No: BPC-001

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 MOTION FOR ORDER  
 (A) COMPELLING ASSUMPTION OR  
 REJECTION OF EQUIPMENT LEASES;  
 (B) DIRECTING PAYMENT OF POST-  
 PETITION ADMINISTRATIVE RENT  
 OR, ALTERNATIVELY,  
 (C) TERMINATING THE AUTOMATIC  
 STAY**

Date: August 2, 2018  
 Time: 9:30 a.m.  
 Dept: B  
 Place: Courtroom 13, 5<sup>th</sup> Floor  
 2500 Tulare Street  
 Fresno, CA 93721

BN 33157043V2

1 Wells Fargo Vendor Financial Services, LLC (“WFVFS”), by and through its undersigned  
2 counsel, Buchalter, A Professional Corporation, hereby submits this memorandum of points and  
3 authorities in support of its *Motion for Order (A) Compelling Assumption or Rejection of*  
4 *Equipment Leases; (B) Directing Payment of Post-Petition Administrative Rent or, Alternatively,*  
5 *(C) Terminating the Automatic Stay Court* (the “Motion”).

## 6 **MEMORANDUM OF POINTS AND AUTHORITIES**

### 7 **I. JURISDICTION AND VENUE**

8 This Court has jurisdiction over the subject matter of the Motion under 28 U.S.C. § 1334.  
9 This matter is a core proceeding as set forth in 28 U.S.C. § 157(b)(2)(A), (G), and (O). Venue in  
10 this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the  
11 relief sought herein are 11 U.S.C. §§ 105(a)<sup>1</sup>, 901(a), 362(d)(1) and (2), 365(d)(1), 365(d)(2),  
12 365(d)(5), 365(p)(1) and 503(b)(1).

### 13 **II. BACKGROUND**

14 Debtor Tulare Local Healthcare District dba Tulare Regional Medical Center (“Debtor”)  
15 commenced this case by filing a voluntary petition under chapter 9 of the Bankruptcy Code (the  
16 “Petition”) on September 30, 2017 (the “Petition Date”).

17 Prior to the Petition Date, the Debtor and General Electric Credit Corporation (“GECC”)  
18 entered into certain executory contracts (collectively, the “Equipment Leases”) pursuant to which  
19 the Debtor leased certain personal property (collectively, the “Equipment”). WFVFS is the  
20 successor in interest to GECC pursuant to that certain assignment, by GECC to WFVFS, of the  
21 Equipment Leases, effective as of March 1, 2016. The key terms of the Equipment Leases are as  
22 follows:

#### 23 **A. Equipment Lease No. 1**

24 On or about May 19, 2014, the Debtor, as lessee, and GECC, as lessor, entered into a  
25 written Equipment Lease Agreement bearing number 7803514001 (“Lease No. 1”). Under Lease  
26 No. 1, GECC agreed to lease to the Debtor certain personal property (“Equipment No. 1”),  
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28 <sup>1</sup> Unless otherwise indicated, all statutory references herein are to 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”).

1 together with all attachments, accessories and replacements as more fully described therein. The  
2 Debtor acknowledged receipt of Equipment No. 1. A true and correct copy of Lease No. 1 is filed  
3 concurrently herewith as Exhibit 1 to the Declaration of Lisa Boddicker (“Boddicker  
4 Declaration”) filed concurrently herewith in support of the Motion.

5 Under Lease No. 1, the Debtor agreed, among other things, that:

- 6 1. the initial term of Lease No. 1 would be sixty (60) months;
- 7 2. the Debtor would make sixty (60) consecutive monthly payments in the  
8 amount of \$5,677.00 each;
- 9 3. late charges would accrue on any payment not paid when due;
- 10 4. if the Debtor failed to make any payment when due or if any other event of  
11 default occurred under Lease No. 1:
  - 12 a. GECC could declare the Debtor in default and exercise all of its  
13 rights and remedies under Lease No. 1 and applicable law;
  - 14 b. GECC could declare all unpaid rental payments and all future rental  
15 payments immediately due and payable;
  - 16 c. GECC could take possession of Equipment No. 1 wherever located  
17 without court order or other process of law; and
  - 18 d. The Debtor would pay the lessor all of its costs and expenses,  
19 including reasonable attorneys’ fees, incurred in the enforcement of its rights  
20 thereunder.

21 WFVFS, as successor in interest to GECC, has performed all covenants, conditions and  
22 promises required of it under the terms of Lease No. 1.

23 **B. Equipment Lease No. 2**

24 On or about January 11, 2016, the Debtor, as lessee, and GECC, as lessor, entered into a  
25 written Equipment Lease Agreement bearing number 7803514002 (“Lease No. 2,” and together  
26 with Lease No. 1, collectively, the Equipment Leases defined above). Under Lease No. 2, GECC  
27 agreed to lease to the Debtor certain personal property (“Equipment No. 2,” and together with  
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Equipment No. 1, collectively, the Equipment defined above), together with all attachments, accessories and replacements as more fully described therein. The Debtor acknowledged receipt of Equipment No. 2. A true and correct copy of Lease No. 2 is filed concurrently herewith as Exhibit 2 to the Boddicker Declaration.

Under Lease No. 2, the Debtor agreed, among other things, that:

1. the initial term of Lease No. 2 would be sixty (60) months;
2. the Debtor would make sixty (60) consecutive monthly payments in the amount of \$1,878.45 each;
3. late charges would accrue on any payment not paid when due;
4. if the Debtor failed to make any payment when due or if any other event of default occurred under Lease No. 2:
  - a. GECC could declare the Debtor in default and exercise all of its rights and remedies under Lease No. 2 and applicable law;
  - b. GECC could declare all unpaid rental payments and all future rental payments immediately due and payable;
  - c. GECC could take possession of Equipment No. 2 wherever located without court order or other process of law; and
  - d. the Debtor would pay the lessor all of its costs and expenses, including reasonable attorneys' fees, incurred in the enforcement of its rights thereunder.

WVFS, as successor in interest to GECC, has performed all covenants, conditions and promises required of it under the terms of Lease No. 2.

**C. Debtor's Defaults and WVFS' Damages under the Equipment Leases**

Beginning on or about April 11, 2017, the Debtor defaulted under the Equipment Leases by, among other things:

1. failing to make the payments owed to WVFS under the Equipment Leases on April 11, 2017 (Equipment Lease No. 2) and May 19, 2017 (Equipment Lease No. 1),

1 respectively, and each month thereafter on the dates due in accordance with the terms of  
2 each Equipment Lease;

3 2. failing and refusing to make the Equipment available to WFVFS for  
4 inspection and/or repossession based on the Debtor's failure to make the monthly lease  
5 payments due under the Equipment Leases; and

6 3. ceasing to communicate with WFVFS in a timely manner.

7 Based on the foregoing events of default under the Equipment Leases, on  
8 September 12, 2017, WFVFS exercised its rights under the Equipment Leases and declared the  
9 Debtor's default thereunder and demanded all unpaid rental payments to date and all future rental  
10 payments owed under the Equipment Leases immediately due and payable.

11 Despite WFVFS's written demand for immediate payment, the Debtor failed and refused  
12 to perform its obligations under the Equipment Leases. Thus, as of the Petition Date, the  
13 Debtor's obligations to WFVFS under the Equipment Leases include payment, in the aggregate,  
14 of an amount not less than \$275,350.78, plus late charges, costs, attorneys' fees and expenses  
15 accrued prepetition. The Debtor has not paid any portion of this amount.

16 Additionally, the Debtor has failed to make any payments post-petition, including  
17 payments due and payable to WFVFS on the first day of each month, beginning on October 1,  
18 2017, under both Equipment Leases. The monthly payment amount under Lease No. 1 is  
19 \$5,795.48; and the monthly payment amount under Lease No. 2 is \$1,878.45.

### 20 III. ARGUMENT

#### 21 A. This Court Should Compel the Debtor to Assume or Reject the Leases Pursuant in 22 Accordance with Section 365(d)(2) of the Bankruptcy Code.

23 Section 365(d)(2) provides the Court with authority to compel a trustee or debtor in  
24 possession to assume or reject an executory contract or unexpired lease "within a specified period  
25 of time." 11 U.S.C. § 365(d)(2). Because section 365(d) does not proscribe a deadline by which  
26 a trustee or debtor in possession must make this decision, section 365(d)(2) provides a  
27 countermeasure to balance the interest of the estate against the interest of a non-debtor contract  
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1 party: the court has the discretion to compel the trustee or debtor in possession to assume or  
2 reject an executory contract within a “reasonable time.” *Zions Credit Corp. v. Rebel Rents, Inc.*  
3 (*In re Rebel Rents, Inc.*), 291 B.R. 529 (Bankr. C.D.Cal. 2000) (*citing Theatre Holding Corp. v.*  
4 *Mauro*, 681 F.2d 102, 105 (2d Cir. 1982)).

5 When a trustee or debtor in possession continues to use an asset that is the subject of an  
6 unexpired executory contract, unabated and without any compensation to the contract  
7 counterparty, it is even more imperative that the court set a deadline by which the trustee or  
8 debtor in possession must decide whether to assume or reject an executory contract. For example,  
9 in *In re Beker Industrial Corp.*, 64 B.R. 890 (Bankr. S.D.N.Y. 1986), the court granted the non-  
10 debtor contract counterparty’s motion to compel the assumption or rejection of certain executory  
11 contracts because a non-debtor contract counterparty should not be forced to fund, in essence, a  
12 debtor’s bankruptcy case by permitting the estate’s continued use of subject property to the non-  
13 debtor contract counterparty’s detriment. *Id.* at 899.

14 Furthermore, an order requiring the Debtor to decide whether it will assume or reject the  
15 Equipment Leases is necessary here because mere postpetition payments are insufficient to  
16 provide adequate protection of WFVFS’s interests. In fact, courts have held that even the  
17 combination of postpetition payments and a prospective or potential right to an administrative  
18 claim under section 503(b)(1) does not constitute adequate protection of a lessor’s interests under  
19 section 361. *See In re Attorney’s Office Management, Inc.*, 29 B.R. 96 (Bankr C.D. Cal. 1983).  
20 Thus, WFVFS is entitled not only to adequate protection payments under section 363(e) and  
21 maintenance of payments under section 365(d)(5), but also to an order compelling Debtor to  
22 assume or reject the Lease within a reasonable time. *See In re Whitcomb & Keller Mortg. Co.,*  
23 *Inc.*, 715 F.2d 375 7111 Cir. (1983); *see also In re New York Deli Ltd.*, 41 B.R. 198 (Bankr. D.  
24 Haw. 1984).

25 The court has discretion to determine how much time is “reasonable” in light of the  
26 circumstances for a trustee or debtor in possession to assume or reject an unexpired executory  
27 contract under section 362(d)(2). *See New York Deli, Ltd.*, 41 B.R. 198. Here, the Debtor has  
28

1 had more than enough time to determine whether the Equipment is necessary for a reorganization.  
2 More than eight months have elapsed since the Debtor commenced this case. During this time,  
3 the Debtor has been using, or has had access to and the ability to use, the Equipment in  
4 connection with its business for the benefit of its estate, without making a single postpetition  
5 payment under either Equipment Lease and without providing to WFVFS any form of  
6 compensation for the attenuating wear and tear and ordinary depreciation of the Equipment.

7 While the Bankruptcy Code affords a trustee or debtor in possession with a “reasonable”  
8 time to decide whether to assume or reject an unexpired lease or executory contract, the  
9 Bankruptcy Code does not entitle a trustee or debtor in possession to use and enjoy the benefit of  
10 the Equipment endlessly without compensating WFVFS, the owner of the Equipment, and  
11 effectively forcing WFVFS involuntarily to finance the estate’s operations.

12 Under the circumstances, eight months is more than a “reasonable time” by which the  
13 Debtor should decide whether or not it needs common office equipment such as the Equipment  
14 and whether it is in the estate’s best interest to assume or reject the Equipment Leases.  
15 Accordingly, it is appropriate for the Court to compel the Debtor to decide whether to assume or  
16 reject the Leases within 30 days from the date of entry of an order granting this Motion.

17 **B. The Estate Is Required to Pay WFVFS Postpetition Rent Due under the Equipment**  
18 **Leases.**

19 Section 365(d)(5) of the Bankruptcy Code unequivocally mandates a trustee or debtor in  
20 possession to perform all obligations under an unexpired lease or executory contract while the  
21 bankruptcy is pending, including commencement of timely payment of rent 60 days after entry of  
22 an order for relief:

23 (5) The trustee shall timely perform all of the obligations of the  
24 debtor, except those specified in section 365(b)(2), first arising  
25 from or after 60 days after the order for relief in a case under  
26 chapter 11 of this title under an unexpired lease of personal  
27 property (other than personal property leased to an individual  
28 primarily for personal, family, or household purposes), until such  
lease is assumed or rejected notwithstanding section 503(b)(1) of  
this title, unless the court, after notice and a hearing and based on  
the equities of the case, orders otherwise with respect to the  
obligations or timely performance thereof. This subsection shall not



1 be deemed to affect the trustee's obligations under the provisions of  
2 subsection (b) or (f). Acceptance of any such performance does not  
3 constitute waiver or relinquishment of the lessor's rights under such  
4 lease or under this title.

11 U.S.C. § 365(d)(5).

5 In a case under chapter 9 of the Bankruptcy Code, the court will enter an order for relief if  
6 no party objects to the eligibility of the debtor as a chapter 9 debtor under section 109(c) of the  
7 Bankruptcy Code or if the court determines that the debtor is an eligible chapter 9 debtor after  
8 notice and hearing. 11 U.S.C. §§ 921(c), 921(d), and 923.

9 On November 27, 2017, the Debtor filed the Notice of Commencement of Chapter 9 Case  
10 (ECF 244) (the "Chapter 9 Notice"). The Chapter 9 Notice provided that if no party in interest  
11 filed, by January 11, 2018, written objection to the Debtor's Petition and eligibility as a chapter 9  
12 debtor under section 109(c) the Petition would be deemed to constitute the order for relief in this  
13 case, effective as of the Petition Date, and that the Chapter 9 Notice would be deemed notice of  
14 entry such order for relief in this case. Here, the case docket does not indicate that any party filed  
15 a written objection before January 12, 2018. Accordingly, the order for relief in this case is  
16 deemed to have been entered on the Petition Date.

17 Reading section 365(d)(5) together with sections 921 and 923, then, the Bankruptcy Code  
18 required the Debtor to commence making timely payment of rent due and to perform all other  
19 obligations under the Equipment Leases after November 29, 2017 (60 days after the date of the  
20 order for relief (Petition Date)). Despite the mandatory provisions of section 365(d)(5), the  
21 Debtor has not yet made a single payment to WFFVS on account of the Equipment Leases.  
22 Accordingly, WFFVS requests that the Court order the Debtor to comply with section 365(d)(5)  
23 retroactively as to the first payment due under the Equipment Leases after November 29, 2017,  
24 and to perform all other obligations due thereunder since that date.

25 **C. WFFVS Is Entitled to a Priority Claim for Administrative Expenses for Postpetition**  
26 **Rent.**

27 Section 503(b) provides that:  
28



1 After notice and a hearing, there shall be allowed administrative  
2 expenses other than claims allowed under section 502(f) of this  
title, including

3 (1)(A) the actual, necessary costs and expenses of  
4 preserving the estate, including wages, salaries, or commissions for  
services rendered after the commencement of the case ...

5 11 U.S.C. § 503(b).

6 The Supreme Court has held that, “[i]f the debtor in possession elects to continue to  
7 receive benefits from the other party to an executory contract pending a decision to reject or  
8 assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those  
9 services.” *Nat’l Labor Relations Bd. v. Bildisco & Bildisco*, 465 U.S. 513, 531, 104 S. Ct. 1188,  
10 1199 (1984). Furthermore, “depending on the particular circumstances of the contract, [the  
11 payment amount] may be what is specified in the contract.” *Id.*; see also *In the Matter of*  
12 *Glasmark, Ltd.*, 193 F.3d 371, 374 (5th Cir. 1999); *In re Bryant Universal Roofing, Inc.*, 218 B.R.  
13 948, 956 (Bankr. D. Ariz. 1998).

14 As described above, the Debtor’s estate has benefitted from its continued access to and  
15 use of the Equipment and continues to benefit, all while failing to perform its statutory  
16 obligations or compensating WFVFS or otherwise ensuring adequate protection of WFVFS’s  
17 interests in the Equipment. WFVFS, on the other hand, has been providing to the Debtor access  
18 to and enjoyment of the Equipment since well before the Petition Date, notwithstanding the  
19 Debtor’s failure to make any payments due to WFVFS due under the Equipment Leases. As a  
20 result, WFVFS has conferred a direct, beneficial impact on the Debtor’s business operations and  
21 added value to the Debtor’s estate sufficient to entitle WFVFS to an administrative expense claim  
22 for all unpaid amounts due under the Equipment Leases. See *In re Dant & Russell, Inc.*, 853 F.2d  
23 700, 706-07 (9th Cir. 1988).

24 Therefore, as the Debtor has failed to pay postpetition rent to WFVFS and otherwise  
25 comply with its obligations as a debtor in possession, including abiding by the terms of the  
26 Equipment Leases, while continuing to derive benefit from the use and availability of the  
27 Equipment, WFVFS also requests the Court enter an order under section 503(b)(1) allowing a  
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1 priority, unsecured for administrative expense claim in favor of WFVFS for all unpaid  
2 postpetition rent accruing under the Equipment Leases after the Petition Date in such amounts as  
3 set forth in the Boddicker Declaration.

4 **D. Alternatively, WFVFS Is Entitled to Adequate Protection or Relief From the**  
5 **Automatic Stay.**

6 Section 363(e) of the Bankruptcy Code provides, in pertinent part:

7 [O]n request of an entity that has an interest in property used, sold  
8 or lease ... by the trustee, the court, with or without a hearing, shall  
9 prohibit or condition such use, sale or lease as is necessary to  
provide adequate protection of such interest.

10 11 U.S.C. § 363(e).

11 By its very nature, the Equipment is a depreciating asset and will continue to depreciate  
12 over time due to the wear associated with Debtor's continued use of the Equipment and  
13 obsolescence due to the passage of time. *See* Boddicker Declaration at ¶¶ 12-15. Pursuant to  
14 section 361, periodic cash payments are an acceptable form of the adequate protection for which  
15 section 363 provides. 11 U.S.C. § 361(1). As stated in the Boddicker Declaration, the Equipment  
16 depreciates on a monthly basis at a rate equivalent to the amount of the payments that would be  
17 due under the Equipment Leases (\$5,795.48 under Lease No. 1 and \$1,878.45 under Lease  
18 No. 2).

19 If WFVFS's interest in the Equipment is not adequately protected during this case because  
20 the Debtor fails or is unable to make cash payments as due under the Equipment Leases or  
21 otherwise, the Court has authority under section 362(d) to grant WFVFS relief from the automatic  
22 stay under section 362(a). 11 U.S.C. § 362(d)(1). Once a party in interest demonstrates (1)  
23 "cause" or (2) that the debtor does not have any equity in the property at issue and that the  
24 property is not necessary to an effective reorganization, the Court shall grant relief from the  
25 automatic stay. 11 U.S.C. § 362(d)(1) and (d)(2).

26 Cause to terminate the automatic stay exists in this case because WFVFS's interest in the  
27 Equipment is not adequately protected. WFVFS' interest in the Equipment has diminished and  
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1 continues to do so during the course of this case. The value of the Equipment is declining daily  
2 due to the Debtor's continued use and ordinary depreciation. Where the Debtor has not made any  
3 payments to WFVFS of the amounts due and owing to WFVFS under the Equipment Leases  
4 since before the Petition Date and where the asset values are declining, the Court has discretion  
5 to, and should, terminate the automatic stay as to WFVFS and the Equipment.

6 Furthermore, if the Court compels the Debtor to assume or reject the Leases and the  
7 Debtor ultimately rejects one or both of the Equipment Leases, the automatic stay automatically  
8 will terminate in favor of WFVFS under section 365(p)(1), thereby permitting WFVFS to pursue  
9 its rights and remedies under the Equipment Leases relating to the Equipment.

#### 10 IV. CONCLUSION

11 Based on the foregoing, WFVFS respectfully requests that this Court enter an order (A)  
12 requiring the Debtor to obtain an order approving assumption of the Leases forthwith, or have the  
13 Leases deemed rejected; (B) directing payment of administrative rent; or, alternatively, (C)  
14 granting WFVFS adequate protection or relief from stay, including waiver of the 14-day waiting  
15 period prescribed by Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure. In addition,  
16 requests such other and further relief as the Court deems just and proper.

17 DATED: June 29, 2018

BUCHALTER  
A Professional Corporation

18  
19  
20 By: /s/ Jeannie Kim

JEANNIE KIM  
Attorneys for Movant  
Wells Fargo Vendor Financial Services, LLC